No. 20,228

United States Court of Appeals

For the Ninth Circuit

GREAT WESTERN LAND AND DEVELOPMENT, INC., et al.,
Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Appellee.

Appeal from the United States District Court for the District of Arizona

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

Appellee, Securities and Exchange Commission, initiated this action by a complaint for injunction under Section 22 (A) of the Securities Act of 1933 as amended (15 U.S.C. 77 v. (a)). (R. document numbered 1). No objection was interposed to the jurisdiction of the United States District Court.

The jurisdiction of the Court of Appeals to review all final decisions of the District Courts of the United States rests in Title 28, Section 1291 U.S.C.A., as amended July 7, 1958, Public Law 85-508 Section 12(e), 72 Stat. 348.

STATEMENT OF THE CASE

On August 30, 1962, appellee filed a complaint for injunction in the District Court for the District of Arizona alleging that since on or about February of 1958, the appellants, and each of them, had been and were then violating the Provisions of the Securities Act of 1933 (R. document numbered 1). Attached to said complaint were affidavits of Lester R. Arie, Sally Arie, George Goettlinger and Arthur H. Hutton (R. documents numbered 3).

The District Court thereupon issued a temporary restraining order and order to show cause directed to the appellants (R. document numbered 2).

The appellants denied they were either engaged in or about to engage in, acts or practices which constituted violations of the laws of the United States (R. document numbered 4).

On the same date, the appellants moved the District Court to enter an order quashing the temporary restraining order and order to show cause on the grounds that appellants were not at that time engaged, or about to engage, in acts or practices constituting a violation of the Securities Act of 1933. This motion was supported by an affidavit of Wayne H. Allen and Chester J. Peterson affirming that appellants had not engaged in any of the acts complained of by the appellee since May, 1962; that they did not believe such acts to be in violation of the Securities Act of 1933; that they had, furthermore, advised Arthur H. Hutton, agent for appellee, prior to the filing of appellee's complaint, that they were not and

would not in the future engage in any of the acts objected to by Mr. Hutton (R. documents numbered 5).

Defendants' motion was presented to the late Judge Arthur M. Davis. Briefs were requested and filed; however, before handing down a decision Judge Davis passed away and the matter remained in status quo until early in 1964 when appellee urged the Court to enter a preliminary injunction.

Appellants then filed a motion to dismiss for mootness, supported by an affidavit of William W. Arnett wherein Arnett swore that the stock of the appellant corporations had been acquired by International Investments Limited, a corporation, and that all of said corporations, except Great Western Land & Development, Inc., had been merged into International Investments Limited and were no longer in existence. He also swore that the appellant, Great Western Land & Development, Inc., was inactive, no longer had a broker's license and was completely controlled by International Investments Limited, which did not intend to activate or use said corporation in the manner formerly operated. He also swore that appellants Wayne H. Allen and E. J. Neve no longer had any interest in, or connection with, any of appellant corporations, and were not offering to the public, or to any individual, any of the contracts mentioned in appellee's complaint. He concluded that none of the appellant corporations intended or desired to ever enter into any transaction of the nature or similar to those complained of in the complaint (R. documents numbered 7).

On March 16, 1964, Judge William J. Lundberg entered a preliminary injunction, at the same time denying appellants' motion to dismiss for mootness (R. document numbered 10).

Thereafter, the appellee filed a motion for summary judgment, together with affidavits of William M. Ziering and Kenneth Miller (R. documents numbered 11). Appellants filed objection to the motion for summary judgment, supporting the same by an affidavit of Chester J. Peterson.

Hearing was had on the motion for summary judgment before the Honorable Walter E. Craig, United States District Judge, who, on April 7, 1965, entered a minute order for summary judgment directing counsel for the appellee to submit proposed findings of fact, conclusions of law and proposed form of judgment (R. document numbered 13).

Appellee presented proposed findings of fact and conclusions of law (R. documents numbered 14), and the appellants entered objections (R. documents numbered 15). Appellants also entered objection to the proposed summary judgment of permanent injunction (R. document numbered 16), and presented their own set of proposed findings of fact, conclusions of law and judgment of dismissal (R. documents numbered 17 and 18).

Thereafter, on May 14, 1965, the Honorable Walter E. Craig entered a minute order denying the objections to the proposed summary judgment of permanent injunction, denying the proposed findings of fact, conclusions of law and proposed judgment sub-

mitted by the appellants and granting the proposed findings of fact, conclusions of law and judgment submitted by the appellee, as modified by the Court (R. document numbered 19).

The Court's findings of fact and conclusions of law as modified and summary judgment of permanent injunction were signed by the Court on May 11, 1965 (R. documents numbered 20 and 21).

This appeal followed:

The precise issues before this Court, in the opinion of the appellants, are these:

1) Were the appellants entitled to have this matter dismissed for mootness on the basis of the record and particularly by virtue of the undisputed facts set forth in the affidavit of William W. Arnett.

2) Were there undisputed facts showing that appellee was entitled to the extraordinary relief of summary judgment of permanent injunction against the appellants, as a matter of law.

3) Were there undisputed facts showing that the appellants were entitled to judgment of dismissal as a matter of law.

SPECIFICATION OF ERRORS

1) The District Court erred in granting the appellee's motion for summary judgment for the following reasons:

a. The undisputed evidence shows the question before the Court had become moot.

b. The uncontroverted facts show that appellee was not entitled to a summary judgment of permanent injunction as a matter of law.

c. The uncontroverted facts show that appellants were entitled to judgment of dismissal as a matter of law.

2) The District Court erred in making findings of fact A 1; C 1, 2, 3, 4, 5 and 6; D, E and G, for the following reasons:

a. Findings A 1, C 1, 3 and 6 and G are contrary to the uncontroverted facts established by the affidavits filed herein.

b. Findings C 1, 2, 3, 4, 5, 6; E and G amount to mere argument and are not facts.

c. The said facts are insufficient and inadequate.

d. The findings are insufficient to show any necessity for the extraordinary relief of injunction.

3) The District Court erred in adopting its conclusions of law for the following reasons:

a. The findings of fact are insufficient to support said conclusions.

b. The uncontroverted facts established by the affidavits herein reflect that said conclusions are not pertinent.

c. Said conclusions are not comprehensive enough to provide a basis for the summary judgment granted by the Court.

4) The District Court erred in granting, approving and signing the formal written Summary Judgment of Permanent Injunction for the following reasons:

a. The questions presented by the appellee's complaint had become moot.

b. The uncontroverted facts reflect that there is no necessity for the extraordinary relief of injunction.

c. The uncontroverted facts reflect that the appellants are entitled to judgment of dismissal as a matter of law.

SUMMARY OF ARGUMENT

I

On a motion for summary judgment, the record will be viewed in the light most favorable to the party opposing the motion.

II

Supporting and opposing affidavits filed in connection with a motion for summary judgment must be made on personal knowledge, must set forth facts which would be admissible in evidence and must show affirmatively that the affiant is competent to testify to the matters stated therein.

III

The Court must find the facts specifically and same must be clear and concise and sufficiently comprehensive and pertinent to provide a basis for the decision.

IV

The sole function of an injunction is to forestall future violations.

V

Where a motion for summary judgment has been made under Fed. R. Civ. P. 56, the District Court has authority to enter a summary judgment against the moving party even though there has been no cross motion for summary judgment.

VI

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance, shall be specific in its terms and shall describe in reasonable detail and not by reference to the complaint or other documents, the act or acts sought to be restrained.

ARGUMENT

Emphasis will be ours unless otherwise indicated.

I

ON A MOTION FOR SUMMARY JUDGMENT, THE RECORD WILL BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE PARTY OPPOSING THE MOTION.

This well established rule was recently reiterated by the United States Supreme Court in the case of *Poller v. Columbia Broadcasting System, Inc.* (App. D.C. 1962), 82 S.Ct. 486, 368 U.S. 464, 7 L. Ed. 2d 458.

As pointed out by the Court in the case of *Oppenheimer v. Morton Hotel Corp.* (D.C. Mich. 1962), 210 F.Supp. 609, affirmed 324 F.2d 766, a summary judgment is an extreme remedy and the facts must be taken as most favorable to the party against whom the motion is sought.

II

SUPPORTING AND OPPOSING AFFIDAVITS FILED IN CONNECTION WITH A MOTION FOR SUMMARY JUDGMENT MUST BE MADE ON PERSONAL KNOWLEDGE, MUST SET FORTH FACTS WHICH WOULD BE ADMISSIBLE IN EVIDENCE AND MUST SHOW AFFIRMATIVELY THAT THE AFFIANT IS COMPETENT TO TESTIFY TO THE MATTERS STATED THEREIN.

The foregoing rules are taken from the Rules of Civil Procedure, Rule 56 (e).

In view of the rules set forth under I and II above, let us consider the motion of appellee for summary judgment. Said motion was, according to its terms, based upon "the pleadings, supported by the affidavits of Lester R. Arie, Sally Arie, George Goettlinger, Arthur H. Hutton and K. D. Mattison, on file herein, and the affidavits of William M. Ziering and Kenneth Miller, annexed hereto". The pleadings are unverified so we must turn to the affidavits to learn the facts in this matter.

It would appear that the affidavits of Arthur H. Hutton and William M. Ziering do not comply with the provisions of Rule 56 (e). They were evidently prepared for the purpose of attaching documents,

which in the case of Arthur H. Hutton are filed in the Phoenix Title & Trust Company, and in the case of William M. Ziering are filed in the Superior Court of the State of Arizona, in and for the County of Maricopa. It is respectfully submitted that neither Mr. Hutton nor Mr. Ziering have any personal knowledge concerning the papers themselves, or the information set forth therein, and that they would not be competent to testify to the matters stated in said documents. The affidavits themselves do not appear to contain any statements which are relevant to the issues now before the Court.

The affidavits of Lester R. Arie, Sally Arie and George Goettlinger merely show that sometime during July of 1959, Mrs. Arie placed a check in the mails and received through the mails a description of land which she had purchased and certain papers which she signed in the offices of Great Western Land & Development, Inc. and that Mr. Goettlinger received through the mails, sometime during November of 1961, a deed and assignment of beneficial interest which he had signed previously. Nothing in any of these affidavits reflect the responsibility of any of the appellants for use of the mails. No statement is made to establish who mailed the documents or by whose authority they were mailed.

The affidavit of K. D. Mattison, Trust Officer of the Phoenix Title & Trust Company, executed on February 21, 1964, merely sets forth the procedure followed by Phoenix Title & Trust Company in accepting subdivision trust agreements. This procedure is fol-

lowed not only for the appellants, but also for all of the other persons, partnerships and corporations establishing a subdivision trust agreement with the Phoenix Title & Trust Company.

This affidavit does not reflect any use of the mails or other methods of communication or transportation by any of the appellants. The affidavit of Kenneth Miller reflects a telephone conversation and correspondence between Mr. Miller and one Joseph Allen. He states that Mr. Allen is the local representative or salesman of the appellant Great Western Land & Development, Inc., but does not connect Mr. Allen with any of the other appellants. The telephone conversation took place in September of 1959 and the correspondence took place in May of 1960.

It might be pointed out that under the Law of Arizona, agency may not be established in this manner. In *Litchfield v. Green,* 33 P.2d 290, 43 Ariz. 509, the Supreme Court of the State said:

> " 'It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent *cannot create in himself an authority to do a particular act by its performance;* and that the *authority of an agent cannot be proved by his own statement that he is such.*' "

A further statement in the same case is:

> "But where the nature and extent of an agent's authority is directly involved, it must never be lost sight of; and this cannot be too strongly em-

> phasized, *that it ultimately may be established only by tracing it to its source in some word or act of the alleged principal.* The agent certainly cannot confer authority upon himself, or make himself agent, merely by acting as such, or saying that he is one." (Emphasis by the Court.)

The appellants' pleadings are also not verified, but are supported by affidavits of Wayne H. Allen and Chester J. Peterson and William W. Arnett (R. documents numbered 5 and 7). The affidavits of Wayne H. Allen and Chester J. Peterson assert that during the Summer of 1962, Arthur H. Hutton contacted Mr. Allen and Mr. Peterson as representatives of the appellants in his capacity as an agent for the appellee; that at that time he stated the sale of undivided interests in real property by the appellants constituted a violation of the laws of the United States, inasmuch as he believed the same constituted the sale of a security without registration with the Securities and Exchange Commission; that during the conversations, both affiants, who were then both officers and directors of the defendant corporations, advised Mr. Hutton that they did not believe they were selling a security, that the Attorney General of the State of Arizona had stated the sales did not involve securities under the laws of the State of Arizona, and they did not believe they were guilty of violating the laws of the United States. The affiants further advised Mr. Hutton that notwithstanding their feeling concerning the sales of undivided interest in real property, none of the appellants had, since May of 1962, made any such sales;

that none of the appellants were at that time contemplating any further sales; that in view of Mr. Hutton's belief that such sales constituted the sale of a security, no further sales would be made by any of the defendants in the manner and form objected to by Mr. Hutton. Affiants further stated that Mr. Hutton was advised that defendants did not want to be in trouble with the Securities and Exchange Commission; did not want to have litigation over Mr. Hutton's claim and that any sales in the future would be made by deed rather than by the deed and assignment to which Mr. Hutton objected. Affiants further stated that Mr. Hutton *"was repeatedly"* advised that none of the sales objected to would be made from the time of his initial contact with the affiants, that no such sales had been made since that time and that the defendants were not then offering, nor did they intend to offer in the future, any such sales or to engage in any of the acts to which Mr. Hutton objected.

The foregoing affidavit was never controverted by Mr. Hutton or any other individual in behalf of the appellee.

In addition to the foregoing affidavit, the appellants also attached an affidavit of William W. Arnett to a motion to dismiss for mootness (R. document numbered 7). In his affidavit, Mr. Arnett stated that he was at that time, February 25, 1964, President of the Great Western Land & Development, Inc. and an officer of the other appellant corporations; that he was also an officer of a corporation known as International Investments Limited; that through the acquisition of

all of the stock of appellant corporations International Investments Limited became the sole stockholder therein and merged into International Investments Limited all of the appellant corporations, save and except Great Western Land & Development, Inc.; that as to this latter corporation it no longer had a broker's license, was not conducting any sales of property, was completely controlled and owned by International Investments Limited and that the latter corporation did not intend to activate or use said Great Western Land & Development, Inc. in the manner in which it was used by the former owners thereof. The affiant further stated that none of the corporations were then active, nor were any of them offering to the public, or to anyone, or at all, the contracts mentioned in appellee's complaint and complained of therein, either directly or indirectly, or at all. He also affirmed that none of the corporations intended to ever again offer said contracts to the public or to any individual, or at all, in any manner, shape or form. In addition he affirmed that the appellants Wayne H. Allen and E. J. Neve no longer owned any interest in or had any stock in any of said appellant corporations. That they had both become disassociated with all of said corporations since the year 1962, and that neither of them were then, nor had they been, offering to the public, or to any individual, any of the contracts mentioned in appellee's complaint since prior to the time when appellee's complaint was filed. The concluding affirmation was that none of the corporations mentioned as appellants in this action intended or desired to ever again enter into

any transactions of the nature, or similar to those complained of, in appellee's complaint, neither then nor in the future.

This affidavit of William W. Arnett was never controverted by anyone in behalf of the appellee.

It would appear to us, therefore, that the competent facts in the record viewed most favorable to the appellants clearly establish that the appellants, upon being informed of the feelings of the appellee concerning the possible illegal nature of their sales of interests in real property, immediately informed the appellee of their belief, up to that time supported by a decision of the Attorney General of the State of Arizona, that they were not in violation of the law, but that in view of the question on the part of Arthur H. Hutton, an agent of the appellee, they immediately discontinued any further offering of the contracts objected to and had not, nor did they intend or desire to ever enter into any such transactions in the future. They stated they would make all sales of real estate by regular deed rather than by the deed and assignment procedures objected to by appellee.

III

THE COURT MUST FIND THE FACTS SPECIFICALLY AND SAME MUST BE CLEAR AND CONCISE AND SUFFICIENTLY COMPREHENSIVE AND PERTINENT TO PROVIDE A BASIS FOR THE DECISION.

Rule 52 of the Rules of Civil Procedure provides in part: The Court shall find the facts specifically and state separately its conclusion of law thereof, and direct the entry of appropriate judgment.

This rule is not satisfied by mere lip service (*Aetna Insurance Co. v. Stanford,* 273 F.2d 150).

A fair compliance with this rule is mandatory (*Kweskin v. Finkelstein,* 223 F.2d 677).

Findings of fact on every material issue are required by this rule and there must be such subsidiary findings of fact as will support ultimate conclusions reached by the Court (*Kweskin v. Finkelstein,* 223 F. 2d 677).

Findings of fact should not be a mere submission of the details of evidence (*Central Railroad Co. of New Jersey v. Hanover Bank & Trust Co.,* 29 F. Supp. 826).

Findings of fact should be a clear and concise statement of the ultimate facts and not a statement, report or recapitulation of evidence from which facts may be found or inferred (*Brown Paper Co. v. Irvine,* 134 F.2d 337).

The ultimate test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to issues to provide a basis for the decision,

and whether they are supported by evidence (*Carr v. Yokahama Specie Bank,* 200 F.2d 251).

The purpose of findings of fact is to affirm a clear understanding to the Court of Appeals of the basis of the decision of the District Court (*United States v. Horsfall,* 270 F.2d 107).

The purpose of a finding of fact is to distill from the evidence the pertinent facts found to which relevant rules of law may be applied and *speculation may not be submitted for proof;* fact findings require probative facts capable of supporting, with reason, the conclusion expressed (*United States v. 15.3 Acres of Land,* 154 Fed.Supp. 770).

With these rules in mind, it is respectfully submitted that findings A 1, C 1, 3, 6, D and G are not supported by any evidence in any of the affidavits relied upon by the appellee. It will also be observed that findings C 1, 2, 3, 4, 5, 6, D, E and G amount to mere argument; thus, the only findings which appear to comply with the rules above outlined are findings A 2, B and F, which findings are insufficient to support the conclusions of law and Summary Judgment made by the Court.

In addition, it would appear that the conclusions of law are mainly argument and citations from various cases reported in the Federal Reporter Systems, rather than actual conclusions as required under the foregoing rules. It is submitted that neither the findings, nor the conclusions, are sufficient to support

the Summary Judgment of Preliminary Injunction ordered by the Court.

IV

THE SOLE FUNCTION OF AN INJUNCTION IS TO FORESTALL FUTURE VIOLATIONS.

The Supreme Court in the *United States v. Medical Association,* 72 S.Ct. 690, 695 (1952) case, made the following statement regarding suits filed for injunctive relief.

> "It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. *The sole function of an action for injunction is to forestall future violations.*"

In the case of *Bowles v. Carnegie Illinois Steel Corp.,* 149 F.2d 545, 547 (7th Cir. 1945), the Court stated:

> "An injunction is a relief granted to prevent future misconduct. *It does not issue to prevent a practice which has been definitely and permanently discontinued.*"

In this *Bowles* case, the record reflected a set of facts similar to those set forth in the affidavits now before the Court. The plaintiff had informed the defendant that it would be, in its opinion, a violation of the ceiling price ruling for defendant to use the scrap purchased at electric furnace prices in its open fire furnaces. The defendant immediately acquiesced and discontinued the practice completely. Under these cir-

cumstances the Circuit Court reversed the District Court's order of injunction with directions to dismiss the suit.

Again in the case of *United States v. W. T. Grant Co.,* 73 S.Ct. 894, 898 (1953), the Supreme Court stated:

> "The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs. But *the moving party must satisfy the Court that relief is needed.* The *necessary determination* is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."

The Court's attention is drawn to the following case: *Shore v. United States,* 282 F. 857, where it is stated:

> "It is, of course, elementary that the finding should be drawn to conform to the allegations of the complaint. Where injunctional relief is sought because of repeated and continuous breaches of duty or violations of the law, *the evidence must show that such violations, if not prevented, will occur in the future. Relief by injunction looks toward the future.* Its purpose is to prevent future injury or to regulate the future conduct of a party. *If the transgressions have ceased before the bill is filed and before proceedings are instituted, and if it appears that they will not be repeated, injunctional relief will not be granted.* The aggrieved party will be left to his action at law. Hence, in the present instance, if the parties who have maintained their premises as a nuisance

> in violation of the National Prohibition Act abated the nuisance and ceased violating the law, prior to the institution of any suit, injunctional relief should have been denied."

We next draw the Court's attention to the case of *Blease v. Safety Transit Co.,* 50 F.2d 852 (4th Cir. 1931), wherein the Court stated:

> "It is insisted that the injunction should have been granted to restrain defendant from operating its busses in intrastate business; but there is no evidence that it was attempting to operate in intrastate business except on the route as to which the certificate of public necessity and convenience had been granted, and, so far as the record shows, *no ground to apprehend that it would attempt to operate in intrastate business elsewhere.* Under such circumstances, the injunction was properly denied; for *it is elementary that a court of equity will not grant an injunction to restrain one from doing what he is not attempting and does not intend to do.*"

In *Securities and Exchange Commission v. Torr,* 87 F.2d 446 (2nd Cir. 1937), the Court stated:

> "It cannot be justly thought that the accused practices were commenced in disregard of the statute. They were continued for only a little over a month and *only while there is evidence that it was for good cause thought that they were not in violation of the law.* Until the disputed facts can be tested by a trial, the only justifiable conclusion is that the appellants were making a genuine effort to conform to the law and that negatives an inference that violations, such as they were, had

been due to more than mistaken interpretation or would be persisted in after they were called in question. *So far as past conduct is concerned, there was then, no sufficient ground for the preliminary injunction, since it would not support the inference of repetition in the future.*"

The Court concluded its opinion as follows:

"*As the appellants were not engaging in any such acts or practices and the circumstances failed to support any reasonable inference that they were about to engage in any at the time the suit was brought, or at the time the injunction was made effective, we are constrained to hold that it was improvidently granted.*" (Page 450).

In the case of *Hecht Co. v. Bowles,* 321 U.S. 321, 64 Sup.Ct. 587, the Court stated:

". . . Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' Meredith v. City of Winter Haven, 320 U. S. 228, 235, 65 S. Ct. 7, 11. *The historic injunctive process was designed to deter, not to punish.* The essence of equity jurisdiction has been the power of Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. *We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. . . .*"

See also the cases of *United States v. W. T. Grant Co.,* 73 S.Ct. 894, and *United States v. Aluminum Co. of America, et al.,* 148 F.2d 416 (2nd Cir. 1945). In the case of *Securities and Exchange Commission v. Culpepper,* 270 F.2d 241 (2nd Cir. 1959), the Court stated:

> "The case may nevertheless be moot if the defendant can demonstrate that *'there is no reasonable expectation that the wrong will be repeated'* ".

It is respectfully submitted that taking the affidavits of Wayne H. Allen and Chester J. Peterson and William W. Arnett, in their strongest light in favor of the appellants, the appellants have demonstrated that *"there is no reasonable expectation that the wrong will be repeated"*. There isn't even any necessity for its repetition as interests in real property can quite properly be transferred by deed rather than by deed and assignment of beneficial interest.

It would appear from the uncontroverted facts as they exist in favor of the appellants at this time, that there is no need or necessity for injunctive relief against any of the appellants, particularly in view of the fact that the injunction is directed against the use of instruments of transportation or communication in interstate commerce or the mails *"to sell securities issued by the defendant corporations"*, and all of said corporations have been liquidated or are inactive.

V

WHERE A MOTION FOR SUMMARY JUDGMENT HAS BEEN MADE UNDER FED. R. CIV. P. 56, THE DISTRICT COURT HAS AUTHORITY TO ENTER A SUMMARY JUDGMENT AGAINST THE MOVING PARTY EVEN THOUGH THERE HAS BEEN NO CROSS MOTION FOR SUMMARY JUDGMENT.

The District Court for the Southern District of New York in 1963, in the case of *Ruby v. American Airlines, Inc.,* 227 F.Supp. 702, stated the foregoing rule of law.

This would seem to be pertinent in this matter where the appellants did propose a form of judgment of dismissal and had previously made a motion to the Court to dismiss this matter for mootness.

In this connection we draw attention to the case of *Local 33 Int. Hod Carriers, etc. v. Mason Tenders, etc.,* 291 F.2d 496, 505 (2nd Cir. 1961), where Circuit Judge Medina stated:

> "There remains the question whether there is authority to grant summary judgment for defendants in the absence of a cross motion for summary judgment. It is Professor Moore's view that such a motion would be a mere formality and is unnecessary in a situation such as we have before us, *where the proofs before the Court show plaintiff has no case.* Moore's Federal Practice, Vol. 6, pages 2088 and 2089. Although the writer of this opinion expressed a contrary opinion in 1948 as a District Judge, Truncale v. Blumberg, D.C., 8 FRD 492, he is glad to take this occasion to state he has changed his mind. Especially where there are several motions by the respective parties *and the evidence of the facts bearing on the issues*

> *arising out of the complaint is all before the court in affidavit form, it is most desirable that the Court cut through mere out-worn procedure niceties and make the same decisions as would have been made had defendant made a cross motion for summary judgment."*

As was stated in the case of *Rockoff v. Vitex Mfg. Co.,* 230 F.Supp. 23, 25 (District of Virgin Islands 1964):

> *"The plaintiff has not seen fit to file any opposing affidavits,* which are permitted under Rule 56 (e) of the Federal Rules of Civil Procedure. *Thus, the facts related in defendant's affidavit shall be deemed to have been admitted."*

A further rule, as stated in the case of *Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co.,* 202 F.Supp. 514, 516 (E.D. Missouri 1959) is:

> "Where on the basis of the materials presented by his affidavits the movant would be entitled to a directed verdict and the opposing party *fails either to offer counter affidavits or other materials that raise a credible issue* or to show that he has evidence not then available, summary judgment may be rendered for the moving party."

Although the appellants were not the moving parties in this matter, they did move for dismissal at the end of the hearing before Judge Craig and actually presented a judgment of dismissal in an effort to have the Court consider the matter as though a motion had been made by the appellants. It would appear from the foregoing that this Court should reverse

the summary judgment of permanent injunction and instruct the District Court to enter an order dismissing this matter.

VI

EVERY ORDER GRANTING AN INJUNCTION AND EVERY RESTRAINING ORDER SHALL SET FORTH THE REASONS FOR ITS ISSUANCE, SHALL BE SPECIFIC IN ITS TERMS AND SHALL DESCRIBE IN REASONABLE DETAIL AND NOT BY REFERENCE TO THE COMPLAINT OR OTHER DOCUMENTS, THE ACT OR ACTS SOUGHT TO BE RESTRAINED.

In addition to what has been said above, appellants feel there is another reason why the summary judgment of permanent injunction should be reversed. The foregoing rule is taken verbatim from Rule 65 (h) of the Rules of Civil Procedure. As we have endeavored to point out above, the sole function of an injunction is to forestall future violations. It would appear, therefore, that the Court, of necessity, would need to find that there was some threat of future violations by or on the part of those being enjoined. The only effort at making any finding on this question is Finding of Fact No. G, which reads: "There is no assurance that the defendants Wayne H. Allen and E. J. Neve may not at some future date, resume their unlawful activities." This would not appear to be a proper finding of fact, as pointed out above. Be that as it may, the uncontroverted affidavit of Wayne H. Allen states that none of the appellants intend to do any such acts in the future. Furthermore, the record reflects that no such sales were made from the

time the questionable nature thereof was mentioned by Arthur H. Hutton and that there was no intention on the part of the defendants to again engage in the activities complained of. Thus, it would appear that not only did the Court fail to find any basis for issuing or granting an injunction, but also the summary judgment of permanent injunction itself fails to comply with Rule 65 (h) in that it does not set forth any reason for its issuance. Furthermore, the restraining order is very general in its terms, is not limited to the acts complained of in the complaint and is directed against appellants which are no longer in existence.

It is respectfully submitted that the summary judgment of permanent injunction is void for not having complied with the provisions of Rule 65 (h) of the Rules of Civil Procedure, and that the same should, therefore, be reversed with directions to the Court to enter judgment in favor of the appellants.

CONCLUSION

Appellant respectfully urges that the undisputed evidence established by the uncontroverted affidavits of some of the appellants reflects that there is no necessity for the drastic remedy of injunctive relief; that there is no evidence to establish the probability of the appellants engaging in any of the acts objected to by the appellee or its agents in the future, and that, therefore, this Court should reverse the Summary Judgment of Permanent Injunction entered by the District Court and direct the said Court to enter an order of dismissal in this matter.

Dated, Phoenix, Arizona,
August 24, 1965.

Respectfully submitted,
RAWLINS, ELLIS, BURRUS & KIEWIT,
By CHESTER J. PETERSON,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHESTER J. PETERSON,
Attorney for Appellants.